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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEJANDRO CEVALLOS,

Defendant and Appellant.

H034998

(Santa Clara County

Super. Ct. No. CC933834)

Defendant Alejandro Cevallos was convicted by plea of one count of first degree burglary (Pen. Code, §§ 459, 460, subd. (a)). Pursuant to the terms of his plea agreement, the court sentenced defendant to the lower term of two years in state prison.¹ The court also ordered defendant to pay \$21,927.39 in victim restitution as a joint and several obligation with a co-defendant.

On appeal, defendant challenges the victim restitution order. He argues that victim restitution is a form of punishment and that, consequently, the order violates his

¹ A month before entering his plea in this case, defendant pleaded no contest to vehicle theft (Veh. Code, § 10851, subd. (a)) in a separate action (Santa Clara County Case No. CC822046). The court sentenced defendant in both cases at the same time. In addition to the two-year sentence imposed in this case, the court sentenced defendant to the lower term of 16 months in prison in the auto theft case, to be served concurrently with the sentence in this action.

constitutional rights to trial by jury and proof beyond a reasonable doubt. He also contends that in the event the restitution order is valid, the abstract of judgment must be corrected to reflect that his obligation to pay victim restitution is joint and several with his co-defendant.

In reviewing this matter, we noted that in addition to awarding the full value of the victim's losses, the restitution award includes the amount of the victim's insurance deductible and the amount she received from her insurance company for her losses. We requested supplemental briefing from the parties on the question whether these items were properly included in the restitution award. The parties agree that the restitution award should not include the amount of the victim's deductible or the amount of her insurance recovery. We reject defendant's constitutional challenge to the restitution order. However, we will modify the amount of the restitution award by subtracting the amounts of the deductible and the insurance reimbursement, order the abstract corrected to reflect the correct amount and the joint and several nature of the restitution order, and affirm the judgment as so modified.

FACTS AND PROCEDURAL HISTORY

On September 26, 2008, defendant entered the home of Jade Quan and stole several items from her. The record does not contain any information regarding the circumstances of the burglary.

Prior to sentencing, Quan submitted a statement of loss on a probation department form, claiming \$21,927.39 in lost property. She also submitted a list of the items that had been stolen with an estimate of the value of each item or group of items. The stolen property included: two plasma televisions (\$3,354); a stereo system with tall speakers (\$1,190); jewelry (\$4,902); two jewelry boxes (\$258); two Louis Vuitton handbags (\$3,100); 200 book CD's (\$2,600 or \$13 per CD); and the cost of a plane ticket from

Orange County to San Jose (\$350). The total value of the items on Quan's list was \$15,754.

Quan's itemized list indicates that Farmers Insurance had paid her \$4,673.39; that some of the items (the book CD's and the plane ticket) had not been "claimed through insurance"; and that Quan's deductible was \$1,500. In calculating her total claim, Quan added her \$1,500 deductible and the \$4,673.39 she received from Farmers Insurance to the total loss figure, thereby increasing the amount of her claim by \$6,173.39 to \$21,927.39.

At sentencing in June 2009, the court indicated that it would "impose a general order of restitution in the matter." Defense counsel requested further hearing with respect to victim restitution, arguing that the amount claimed was "over double what was initially claimed by the victim." Defense counsel stated that she had just been handed Quan's "spreadsheet of amounts" and asked for time to investigate the claim. The court awarded an "indicated restitution sum of \$21,927.39" to Quan "subject to a hearing on the issue" and set the matter for further hearing on restitution. The court also ordered that restitution would be "joint and several . . . with co-defendant."

The court conducted a hearing on restitution on November 17, 2009, at which it referred to an "excel spreadsheet" in which the victim had claimed \$21,927.39. This appears to be the same itemized list that was in the file at sentencing. Defense counsel asked the court "to consider the sufficiency of the documentation" that had been provided by the victim and to require a "deeper level of documentation," since the victim was "claiming about \$22,000 worth of stolen items when what was indicated in the police report was roughly \$8,000." The court responded that the victim was in the process of moving at the time of the offense and that since then she had been "able to document and fine tune her loss." The spreadsheet indicates that Quan had moved from San Jose to Trabuco Canyon, near Mission Viejo, California.

The court inquired whether the \$4,673.39 paid by insurance should be subtracted from the total or included in that number. The probation officer responded that it should be included in the total. Defense counsel said Quan had told a defense investigator that she was not requesting any restitution, but had also told probation that she was “asking for an amount.” Defense counsel argued that Quan should have supported her claim with sales receipts, credit card receipts, or photographs of the items. The court stated that once Quan presented her claim, it was up to defendant to present evidence challenging the amount claimed. Since there was nothing contradicting Quan’s claim, the court ordered restitution in the amount of \$21,927.39.

DISCUSSION

Right to Jury Trial and Proof Beyond a Reasonable Doubt on Victim Restitution

Defendant contends that the trial court violated his state and federal due process and jury trial rights because he did not receive a jury trial on the issue of victim restitution and because the restitution order was not based on facts that were established beyond a reasonable doubt. Defendant argues that victim restitution is a form of punishment and relies on the United States Supreme Court’s ruling in *Cunningham v. California* (2007) 549 U.S. 270, which held that “under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence.” (*Id.* at p. 281.) His argument derives from *Cunningham* and its predecessors, including *United States v. Booker* (2005) 543 U.S. 220, *Blakely v. Washington* (2004) 542 U.S. 296, and *Apprendi v. New Jersey* (2000) 530 U.S. 466, “in which the United States Supreme Court recognized a defendant’s Sixth Amendment right to a jury trial on any fact that exposes the defendant to a potentially greater sentence than that supported

by facts found by the jury to be true.” (*People v. Chappelone* (2010) 183 Cal.App.4th 1159, 1183-1184 (*Chappelone*).)

We begin by noting that defendant did not object at the restitution hearing that he had been denied his constitutional rights under *Cunningham*. However, to the extent defendant’s claim may be considered a claim that the trial court exceeded its authority under Penal Code section 1202.4, subdivision (f),² we find that defendant’s failure to object did not result in forfeiture of the issue because the claim falls within the “ ‘unauthorized sentence’ ” exception to the general rule that failure to raise an issue in the trial court results in forfeiture of the issue on appeal. (*People v. Slattery* (2008) 167 Cal.App.4th 1091, 1095.) We will therefore consider the merits of defendant’s claim.

General Principles Governing Victim Restitution

We begin our analysis of the merits of the appeal by reviewing general principles governing victim restitution orders.

“In 1982, California voters passed Proposition 8, also known as The Victims’ Bill of Rights. . . . Proposition 8 established the right of crime victims to receive restitution directly ‘from the persons convicted of the crimes for losses they suffer.’ ” (*People v. Giordano* (2007) 42 Cal.4th 644, 652 (*Giordano*).) Proposition 8 added new article I, section 28 to the California Constitution, which at the time of the offense in this case provided: “It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted of the crimes for losses they suffer. [¶] Restitution shall be ordered from the convicted persons in every case, regardless of the sentence or

² All further unspecified statutory references are to the Penal Code.

disposition imposed, in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary.” (Former Cal. Const., art. I, § 28, subd. (b).)³

“California Constitution, article I, section 28, subdivision (b), which is not self-executing, directed the Legislature to adopt implementing legislation.” (*Giordano, supra*, 42 Cal.4th at p. 652.) To that end, the Legislature enacted section 1202.4. Under that code section, the court must order direct victim restitution in “every case in which a victim has suffered economic loss as a result of the defendant’s conduct.” (§ 1202.4, subd. (f); see also § 1202.4, subd. (a)(1).) The court “shall require” the defendant to make restitution “based on the amount of loss claimed by the victim . . . or any other showing to the court. . . . The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so and states them on the record.” (§ 1202.4, subd. (f).)

Section 1202.4, subdivision (f)(3) provides that “[t]o the extent possible, the restitution order . . . shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant’s criminal conduct.” Subdivision (f)(3) identifies 11 categories of economic losses that are recoverable by victims, including losses to property. Economic loss for the purposes of victim restitution includes “[f]ull or partial payment for the value of stolen or damaged property. The value of stolen or damaged property shall be the replacement cost of like property, or the actual cost of repairing the property when repair is possible.” (§ 1202.4, subd. (f)(3)(A).)

A defendant is entitled to a hearing to “dispute the determination of the amount of restitution.” (§ 1202.4, subd. (f)(1).) A restitution hearing is usually held at the time of sentencing. The burden of proof at a restitution hearing is by a preponderance of the

³ Former California Constitution article I, section 28 was amended by initiative measure (Proposition 9) on November 4, 2008. Former subdivision (b) was designated as subdivision (b)(13) and the text of the subdivision was amended.

evidence. (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1542 (*Gemelli*); *People v. Baker* (2005) 126 Cal.App.4th 463, 469 (*Baker*).)

The victim's statement about the value of property stolen, without supporting documentation, is prima facie evidence of the value of the property for the purpose of restitution. (*People v. Prosser* (2007) 157 Cal.App.4th 682, 690.) "Once the victim has made a prima facie showing of his or her loss, the burden shifts to the defendant to demonstrate that the amount of the loss is other than that claimed by the victim." (*Id.* at p. 691.) Absent a challenge by the defendant, an award of the amount specified in the probation report is not an abuse of discretion. (*People v. Pinedo* (1998) 60 Cal.App.4th 1403, 1406-1407.)

"Section 1202.4 does not, by its terms, require any particular kind of proof. However, the trial court is entitled to consider the probation report, and, as prima facie evidence of loss, may accept a property owner's statement made in the probation report about the value of stolen or damaged property." (*Gemelli, supra*, 161 Cal.App.4th at p. 1543, citing *People v. Foster* (1993) 14 Cal.App.4th 939, 946 (*Foster*), superseded by statute on other grounds as stated in *People v. Birkett* (1999) 21 Cal.4th 226, 238-245; but see *People v. Harvest* (2000) 84 Cal.App.4th 641, 653 (*Harvest*) [probation officer's report "may satisfy notice requirements for due process [citation], but it cannot take the place of evidence"].) " "This is so because a hearing to establish the amount of restitution does not require the formalities of other phases of a criminal prosecution. [Citation.] When the probation report includes information on the amount of the victim's loss and a recommendation as to the amount of restitution, the defendant must come forward with contrary information to challenge that amount.' " (*People v. Keichler* (2005) 129 Cal.App.4th 1039, 1048, citing *Foster*, at p. 947.)

There must be a rational relationship between the restitution order and the victim's loss, but "[t]here is no requirement the restitution order be limited to the exact amount of the loss in which the defendant is actually found culpable, nor is there any requirement

the order reflect the amount of damages that might be recoverable in a civil action.” (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.) A restitution order compensates the victim for his or her actual loss and is not intended to provide the victim with a windfall. (*People v. Millard* (2009) 175 Cal.App.4th 7, 28 (*Millard*); *In re Anthony M.* (2007) 156 Cal.App.4th 1010, 1017-1018.) The court need not order restitution in the precise amount of the loss, but “must use a rational method that could reasonably be said to make the victim whole, and may not make an order which is arbitrary or capricious.” (*People v. Thygesen* (1999) 69 Cal.App.4th 988, 992; see also *In re Brian S.* (1982) 130 Cal.App.3d 523, 527 [“court may use any rational method of fixing the amount of restitution which is reasonably calculated to make the victim whole”].)

“[D]irect victims of crime have a statutory right to restitution on the full amount of their losses without regard to the full or partial recoupment from other sources (except the state Restitution Fund).” (*Baker, supra*, 126 Cal.App.4th at p. 468.)

Standard of Review

Generally speaking, restitution awards are vested in the trial court’s discretion and will be disturbed on appeal only when the appellant has shown an abuse of discretion. (*People v. Fortune* (2005) 129 Cal.App.4th 790, 794.) “ ‘[E]ven though the trial court has broad discretion in making a restitution award, that discretion is not unlimited. While it is not required to make an order in keeping with the exact amount of loss, the trial court must use a rational method that could reasonably be said to make the victim whole, and may not make an order which is arbitrary or capricious.’ ” (*People v. Mearns* (2002) 97 Cal.App.4th 493, 498.) “ ‘When there is a factual and rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court.’ ” (*Id.* at p. 499.) But we review the constitutional challenge presented here de novo. (*People v. Cromer* (2001) 24 Cal.4th 889, 894.)

Analysis

In arguing that victim restitution is a form of punishment that triggers the right to jury trial and proof beyond a reasonable doubt, defendant cites *People v. Brown* (2007) 147 Cal.App.4th 1213 (*Brown*), which held that victim restitution is a form of punishment for the purpose of determining whether there has been a violation of the parties' plea agreement under section 1192.5.⁴ (*Id.* at pp. 1221-1223.) *Brown* relied on *People v. Walker* (1991) 54 Cal.3d 1013 (*Walker*), in which the California Supreme Court held that a restitution fine "constitutes 'punishment' for purposes of determining whether there is a violation of the plea agreement when the sentencing court imposes a larger restitution fine than that specified in the plea agreement." (*Brown*, at p. 1222, citing *Walker*, 54 Cal.3d at p. 1024.) The court in *Walker* qualified its holding, stating: "Although the purpose of a restitution fine is not punitive, we believe its consequences to the defendant are severe enough that it qualifies as punishment for this purpose. Accordingly, the restitution fine should generally be considered in plea negotiations." (*Walker*, at p. 1024.)

Defendant also cites *People v. Hanson* (2000) 23 Cal.4th 355 (*Hanson*), which held that restitution fines are punishment for the purpose of applying California's constitutional prohibition against double jeopardy. (*Id.* at pp. 357, 361.) As part of its analysis, the court observed that restitution fines are mandatory and, unlike victim restitution, must be imposed even when there is no victim. (*Id.* at p. 362.) *Hanson* relied on *People v. Zito* (1992) 8 Cal.App.4th 736, 741 (superseded by statute on other grounds as stated in *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1534), which held that restitution fines are punishment for the purpose of ex post facto analysis, and on *Walker*.

⁴ Section 1192.5 provides in relevant part: "Where the plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant, except as otherwise provided in this section, cannot be sentenced on the plea to a punishment more severe than that specified in the plea and the court may not proceed as to the plea other than as specified in the plea."

While *Hanson* held that *restitution fines* are punishment for the purpose of California's constitutional prohibition against double jeopardy (*Hanson, supra*, 23 Cal.4th at pp. 357, 361), the appellate court in *Harvest*, which was decided after *Hanson*, held that *victim restitution* does not constitute punishment for double jeopardy purposes: "victim restitution imposed for the first time at a resentencing following appeal is not punishment and is therefore not constitutionally barred." (*Harvest, supra*, 84 Cal.App.4th 641 at p. 645; *id.* at p. 650.) The court reasoned that "Although restitution has an element of deterrence [citation], the primary purpose of victim restitution is to provide monetary compensation to an individual injured by crime. [Citations.] Compensation is the defining feature of civil law. (E.g., Civ. Code, §§ 3300, 3333 [measure of damages for breach of contract or tort is 'the amount which will compensate the party aggrieved for all the detriment proximately caused thereby'].) Postcriminal proceedings vindicating the remedial purpose of reimbursement have long been treated as not constituting punishment for double jeopardy purposes." (*Id.* at pp. 648-649, citing, *Rex Trailer Co. v. United States* (1956) 350 U.S. 148, 151-154, & *United States v. Ursery* (1996) 518 U.S. 267.) The court explained, "The circumstances in which victim restitution is ordered are not co-extensive with those in which a restitution fine is ordered. The recipients are not the same. The scope of a restitution fine is far different from a victim restitution order. A fine may take account of more diverse factors, but it cannot exceed \$10,000. On the other hand victim restitution is limited to economic loss but is unlimited in the amount that can be ordered. The collection procedures for a restitution order are clearly meant to be civil. [Citations.] Most importantly, the purposes and objectives of each are not the same." (*Harvest*, at p. 649.) The court concluded "from the language of the governing statutes that the Legislature intended victim restitution as a civil remedy rather than as a criminal punishment." (*Ibid.*) The court also held that the statutory scheme governing victim restitution was not so punitive either in purpose or

effect to transform what was clearly intended as a civil remedy into a criminal penalty. (*Id.* at pp. 649-650.)

Defendant also relies on general language from *People v. Hove* (1999) 76 Cal.App.4th 1266, 1273 regarding the functions of victim restitution, which, in addition to compensating the victim, include punishment, rehabilitation, and deterrence. The appellate court in *Hove* did not address the issue presented here. Instead, it held that the trial court did not err in ordering victim restitution in the full amount of the victim's medical expenses, even though the victim had no actual economic losses because his medical expenses were paid by Medicare and/or Medi-Cal. (*Id.* at p. 1272.)

The federal cases that defendant cites, *United States v. Syme* (3d Cir. 2002) 276 F.3d 131 (*Syme*), *United States v. Edwards* (3d Cir. 1998) 162 F.3d 87 (*Edwards*), *United States v. Palma* (3d Cir. 1985) 760 F.2d 475 (*Palma*), and *United States v. Sleight* (3d Cir. 1987) 808 F.2d 1012 (*Sleight*), do not necessarily support his argument. While these cases hold that victim restitution ordered pursuant to a criminal conviction is a criminal penalty (*Syme*, at p. 159; *Edwards*, at p. 91; *Palma*, at p. 479; & *Sleight*, at p. 1020), *Edwards*, an ex post facto case, notes that there is a split of authority on this question in the federal courts of appeal. (*Edwards*, at pp. 89-91, discussing *United States v. Newman* (7th Cir. 1998) 144 F.3d 531; see also *United States v. George* (7th Cir. 2005) 403 F.3d 470, 473 [victim restitution is a civil remedy administered by criminal courts for convenience, not criminal punishment].)

Palma holds that since restitution is a “criminal, rather than civil, penalty,” the restitution provisions of the Victim and Witness Protection Act of 1982 (VWPA) are not subject to the jury trial guarantee of the Seventh Amendment, which preserves the right to jury trial in civil “suits at common law” where the amount in controversy exceeds \$20. (*Palma*, *supra*, 760 F.2d at p. 479; *id.* at p. 480.)

And although the court in *Syme* held that a restitution order under the VWPA is a criminal penalty within the meaning of *Apprendi*, it concluded that such orders do not

violate *Apprendi*'s jury trial guarantee. The court observed that the "operative rule from *Apprendi* is as follows: 'Other than the fact of a prior conviction, any fact the increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.' " (*Syme, supra*, 276 F.3d at p. 159.) The court explained that the VWPA "provides guidelines that a sentencing judge may use to determine the amount of restitution, but does not prescribe a maximum amount" and concluded that *Apprendi* does not apply to restitution orders made under the VWPA "because *Apprendi* applies only to criminal penalties that increase a defendant's sentence 'beyond the prescribed statutory maximum.' " (*Ibid.*) Thus, while *Syme* supports defendant's contention that victim restitution is a form of punishment, it does not support his ultimate assertion that he is entitled to a jury trial and proof beyond a reasonable doubt on the issue of victim restitution.

As the parties note, three California cases address the constitutional challenge presented here. In *Giordano*, the California Supreme Court observed that "numerous courts have held that restitution hearings require fewer due process protections than civil hearings or criminal hearings of guilt." (*Giordano, supra*, 42 Cal.4th at p. 662, fn. 6.) The court noted that these cases were decided prior to *Cunningham* and its own decisions in *People v. Black* (2007) 41 Cal.4th 799 (which was overturned by *Cunningham, supra*, 549 U.S. at p. 293) and *People v. Sandoval* (2007) 41 Cal.4th 825. (*Giordano*, at p. 662, fn. 6.) The court concluded, however, that since the defendant in *Giordano* did not raise any due process or other state or federal constitutional challenges, it had no occasion to address possible constitutional challenges to restitution hearings. (*Ibid.*)

While the California Supreme Court has not weighed in on the questions whether victim restitution must be tried to a jury and established beyond a reasonable doubt, two recent Court of Appeal cases have answered these questions in the negative. In *Millard*, the Fourth District Court of Appeal rejected the defendant's assertion that he had a Sixth Amendment right to a jury trial and a due process right to proof beyond a reasonable

doubt at a victim restitution hearing. The court disagreed with the defendant's "premise that . . . section 1202.4 victim restitution constitutes increased punishment for a crime." (*Millard, supra*, 175 Cal.App.4th at p. 35.) Instead, it agreed with *Harvest* "that the primary purpose of a victim restitution hearing is to allow the People to prosecute an expedited hearing before a trial court to provide a victim with a civil remedy for economic losses suffered and not to punish the defendant for his or her crime." (*Ibid.*) The court explained that "[t]o the extent a victim restitution order has the secondary purposes of rehabilitation of a defendant and/or deterrence of the defendant and others from committing future crimes, those purposes do not constitute increased punishment of the defendant" (*Id.* at pp. 35-36.) The court also reasoned that "section 1202.4's requirement that a trial court issue an order providing for full restitution of a victim's economic losses does not constitute a sentencing choice by the trial court" and that since the restitution hearing took place and the restitution order was issued after the defendant was granted probation, "there was no possibility that at the restitution hearing [the defendant] could be exposed to a greater potential sentence for his crime." (*Id.* at p. 36 & fn. 11)

The First District Court of Appeal recently addressed this issue in *Chappelone, supra*, 183 Cal.App.4th 1159. The court discussed *Giordano* and *Millard*, observed that no California cases support the defendant's position, cited federal appellate court cases from 10 different circuits that had rejected the argument on a variety of grounds, and concluded that the defendant's argument was without merit. (*Id.* at p. 1184.)

Defendant argues that *Millard* was "simply wrong" because it failed "to recognize long-standing authorities establishing that a victim restitution order constitutes criminal punishment." He also asserts that *Millard* is "inapposite" because it arose "in the context of a grant of probation."

We agree with *Millard*, based on *Harvest*, that for the purposes of addressing defendant's jury trial rights and the quantum of proof required at a victim restitution

hearing, victim restitution is a civil remedy and not a form of punishment. We therefore reject defendant's contention that the victim restitution order violated his constitutional rights to trial by jury and proof beyond a reasonable doubt at the victim restitution hearing.

Amount of Award

The value of the property on Quan's list totals \$15,754. In determining the amount of her restitution claim, Quan added the amount of her insurance deductible (\$1,500) and the amount she received from Farmer's Insurance (\$4,673.39) to the value of the stolen property, resulting in a "Total Cost" of \$21,927.39. The parties agree that victim restitution award should not include Quan's deductible or the amount she received from Farmers Insurance and that the correct amount of the restitution award is \$15,754.

Section 1202.4, subdivision (f)(2) provides in part: "Determination of the amount of restitution ordered pursuant to this subdivision shall not be affected by the indemnification or subrogation rights of any third party." The court may not use the amount of any reimbursement a victim receives from his or her own insurer or the insurer of a third party, such as a relative of the defendant, to reduce the amount of a victim restitution award. (*People v. Hamilton* (2003) 114 Cal.App.4th 932, 941 [defendant not entitled to credit for payment made by his mother's insurer to the victim]; *In re Brittany L.* (2002) 99 Cal.App.4th 1381, 1387-1389 [minor not entitled to a credit for payments victims received from their homeowner's insurance carrier].) Thus, Quan's loss and defendant's corresponding obligation to pay victim restitution should not be reduced by any amounts Quan received from her insurance carrier.

However, in this case, Quan increased the amount of her losses by adding in the amount she received from her insurer and her deductible. While defendant is not entitled to a credit for these amounts, Quan is not entitled to have her restitution claim increased by these figures. The \$1,500 deductible is the amount of the loss that Quan agreed to

absorb pursuant to the contract with her insurer. This is a portion of her \$15,754 loss and not an additional loss to her. The amount Farmers Insurance paid is also a portion of her loss and not an additional loss over and above the value of the items on her list. To allow Quan to recover her deductible and her insurance reimbursement, in addition to the value of the items on her list, results in a double recovery and an unauthorized windfall to Quan. We shall therefore modify the judgment to reduce the amount of victim restitution to \$15,754, the value of the stolen items on Quan's list.

Correction of Clerical Error

Where there is a discrepancy between the court's oral pronouncement of judgment and the abstract of judgment, the oral pronouncement controls. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.) The reporter's transcript indicates that the court ordered that defendant's obligation to pay victim restitution was joint and several with a co-defendant.⁵ However, that fact is not reflected in the abstract of judgment. We will therefore order the abstract corrected.

DISPOSITION

The judgment is ordered modified to state that the amount of victim restitution is \$15,754. As so modified, the judgment is affirmed.

The clerk of the superior court is directed to prepare an amended abstract of judgment to reflect the modification in the amount of victim restitution from \$21,927.39 to \$15,754 and to indicate that defendant's liability for victim restitution is joint and

⁵ The record does not reveal the name of the co-defendant. At the change of plea hearing, the court took pleas from defendant and four other individuals. It does not appear that any of those individuals was jointly and severally liable for victim restitution in this case, since the dates of their offenses do not correspond to the date of the burglary in this case.

several with a co-defendant. The clerk is also directed to forward a certified copy of the amended abstract of judgment to the Department of Corrections.

McAdams, J.

WE CONCUR:

Premo, Acting P.J.

Elia, J.